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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/774,658	02/05/2004	Robert G. Cole	2003-0225	8814

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EXAMINER	
POLLACK, MELVIN H	

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2445	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/774,658	COLE ET AL.	
	Examiner	Art Unit	
	MELVIN H. POLLACK	2445	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *28 December 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-19* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-19* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *05 February 2004* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Response to Arguments

1. Applicant's arguments filed 28 December 2009 have been fully considered but they are not persuasive. An analysis of the arguments is provided below.

2. Applicant continues to rely on the specification and intended use in regards to at least some of the arguments against the art, and the examiner has already warned the applicant against such arguments. Instead, the examiner will focus on the structure and functionality of the claims in their broadest reasonable interpretation in light of the knowledge of one of ordinary skill in the art.

3. The arguments seem to focus, once again, on the issues of measuring paths and taking degradations. Applicant is reminded that he is allowed to take this case to the board when the parties reach an impasse.

4. Applicant argues that the art does not expressly disclose "means for taking measurements on each path of all paths (between each pair of routers) (Pp. 8-11)." The test of interpreting the art is to interpret the art as a whole based on ordinary knowledge and common sense of one of ordinary skill in the art. Applicant has misinterpreted the claims by reading in limitations about having to monitor all paths at all time, and for a specific purpose and use. Applicant then misinterprets the art for the express purpose of attempting to differentiate between taking measurements on paths and attempting to determine path performance.

5. In each of the pieces of art, the system provides at the very least the ability to study each and every path, and that they choose to drill down later to determine a customer perspective or to focus on the points of failure is irrelevant, and in fact appears

to be the primary purpose of the applicant's degradation tracking. Huang, in particular, teaches that its primary purpose is "scalability" such that it may study far more paths than that of the prior art, and shows the tracking for each router pair.

6. Applicant then argues that Bradley and Basturk do not expressly disclose charging of degradations (Pp. 9-10). All of the cited art teaches at least some method of determining which routers are underperforming based on some level of tracking over time. While it is true that Basturk focuses on path costs, Basturk also teaches a formula similar to a degradation for the purposes of determining underperformance, both separately and as a function of the path cost.

7. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.,* 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

8. In response to applicant's argument, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

9. Applicant then argues, regarding claim 9, that there cannot be official notice for a dependent claim if the independent limitation is challenged (P. 11). This is an incorrect version of official notice. The action is based on the determination that Basturk teaches a threshold value of some sort. Assuming argumendo that this is the case, applicant failed

to explain why the particular threshold value would not be of sufficient recognition that art of the precise threshold would be required.

10. Therefore, the rejection is maintained for the reasons above, and is final.

Claim Rejections - 35 USC § 103

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

12. Claims 1-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bradley et al. (7,082,463) in view of Basturk (7,111,074).

13. Bradley teaches a method and system (abstract) of determining gateway performance and SLA information (col. 1, line 1 – col. 5, line 15; col. 36, line 55 – col. 68, line 20) wherein a management server connected to router devices (col. 5, lines 15-30) and controlled via a web interface (col. 5, lines 30-35) wherein path measurements are collected and stored within a matrix (col. 5, line 35 – col. 6, line 10; col. 6, line 65 – col. 7, line 5). Test result overlaps are tracked, as are start and end times (col. 8, line 40 – col. 9, line 30). The system tracks threshold and problem information (col. 9, line 30 – col. 21, line 30), including R-Factor equivalent VoIP voice quality data (col. 21, line 30 – col. 24, line 60), and of data manually entered into the matrix (col. 24, line 60 – col. 31, line 15) and reported as a source x destination router report (col. 31, line 10 – col. 34, line 50, esp. col. 33, lines 30-35 and col. 34, lines 5-15).

14. Bradley teaches at the very least tracking a number of said degradation over a period of time for two routers forming a path, wherein the degradation of each specific

router would be determinable by one of ordinary skill in the art with a predictable result that is obvious to try. Bradley does not expressly disclose tracking for a specific router per se. Basturk teaches a method and system (abstract) of making quality measurements on a path in a VoIP network (col. 1, line 1 – col. 4, line 65; col. 9, line 50 – col. 10, line 65) wherein a particular router is charged and tracked (col. 5, line 20 – col. 6, line 30) such that the tracked degradation is provided to underperforming routers (col. 7, line 25 – col. 9, line 50). At the time the invention was made, one of ordinary skill in the art would have added Basturk to Bradley in order to improve load balancing in a case of multiple paths (col. 2, lines 20-30).

15. Bradley and Basturk do not expressly disclose taking measurements on each path of all paths within the network. Huang teaches a method and system (abstract) of using an administrator client to monitor an entire network (col. 1, line 1 – col. 2, line 35; col. 13, line 60 – col. 14, line 15), including paths between routers (col. 2, lines 35 – 45; col. 7, line 25 – col. 9, line 15) and to detect the failure of a single device (col. 3, line 1 – col. 4, line 20) using a degradation system called NAF (col. 4, lines 15 – 30; col. 9, lines 15 - 30) under the control of the administrator (col. 5, line 60 – col. 6, line 60). At the time the invention was made, one of ordinary skill in the art would have added Huang in order to better track failure data (col. 1, lines 35 – 45).

16. For claim 9, Bradley teaches several threshold values, including 75 (col. 32, lines 35-55), but does not expressly declare 70 as a threshold value.

17. Examiner takes Official Notice (see MPEP § 2144.03) that a changed threshold in a computer networking environment was well known in the art at the time the invention

was made. Both models are standard techniques equally effective in determining a threshold crossing. The substitution would have been obvious to one of ordinary skill in the art at the time of the invention as the particular threshold value is irrelevant, as each is a standard technique used by the ordinary artisan and both have been recognized to provide a good estimate. Therefore, the motivation to change the threshold value remains personal preference.

18. The Applicant is entitled to traverse any/all official notice taken in this action according to MPEP § 2144.03. However, MPEP § 2144.03 further states "See also In re Boon, 439 F.2d 724, 169 USPQ 231 (CCPA 1971) (a challenge to the taking of judicial notice must contain adequate information or argument to create on its face a reasonable doubt regarding the circumstances justifying the judicial notice)." Specifically, In re Boon, 169 USPQ 231, 234 states "as we held in Ahlert, an applicant must be given the opportunity to challenge either the correctness of the fact asserted or the notoriety or repute of the reference cited in support of the assertion. We did not mean to imply by this statement that a bald challenge, with nothing more, would be all that was needed". Further note that 37 CFR § 1.671(c)(3) states "Judicial notice means official notice". Thus, a traversal by the Applicant that is merely "a bald challenge, with nothing more" will be given very little weight.

19. The specific value of the threshold does not patentably distinguish the claimed system. It would have been obvious to one of ordinary skill in the art at the time the invention was made to provide any threshold value in the system taught by Bradley because the subjective interpretation of the optimal threshold value does not patentably distinguish the claimed invention.

Conclusion

11. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MELVIN H. POLLACK whose telephone number is (571)272-3887. The examiner can normally be reached on 8:00-4:30 M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vivek Srivastava can be reached on (571) 272-7304. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/M. H. P./
Examiner, Art Unit 2445
17 March 2010

/VIVEK SRIVASTAVA/
Supervisory Patent Examiner, Art Unit 2445